

based upon KTSC's status as a noncommercial educational station. In the letter granting University's application, the Commission expressly recognized the unique role played by noncommercial stations in providing public television service to wide areas. See Exhibit 8. While the noncommercial status of a station is not one of the enumerated factors ordinarily considered in assessing short-spacing waiver requests, it clearly was of critical decisional significance in this instance. In the case of commercial stations, the Commission is not sympathetic to short-spacing waiver requests based solely upon the station's desire to provide better service to a city other than the city of license. See West Michigan Telecasters, Inc., 22 F.C.C.2d 943 (1970) aff'd sub nom. West Michigan Telecasters, Inc. v. FCC, 460 F.2d 883 (D.C. Cir. 1972); Satellite Outreach Ministries, 47 R.R.2d 1381 (Broadcast Bur. 1980). In this case, however, the Commission did grant a waiver based upon University's (not SCC's) stated need to provide public television service to a wide area and especially in Colorado Springs.

17. Through the proposed channel exchange, University now seeks to assign to a commercial entity the construction permit and accompanying waiver that it received based on its non-commercial status and which the commercial station could not have received if it had filed in its own name. Thus, the scheme using the proposed channel exchange would undercut the basis on which the construction permit was originally granted and would create a short-spacing that the Commission would not have authorized. Accordingly, Commission

approval of the channel exchange transaction is far from assured.

IV. IN ANY EVENT CWC HAS DEMONSTRATED THAT
A WAIVER OF SECTION 73.610 IS WARRANTED

A. CWC Has Demonstrated that Equivalent Protection Would Be Provided and that There Would Be No Objectionable Interference.

18. Even if the University's construction permit were viable, CWC has convincingly demonstrated that a waiver of the Commission's spacing rules is warranted. CWC has demonstrated that it will provide equivalent protection to University's proposed facilities. See Exhibit 1. It is clear that if CWC had filed an application for full facilities at the Laramie reference point, that application necessarily would have been acceptable without a waiver despite the short-spacing to the facilities authorized in University's construction permit. The construction permit was granted on the basis, among other things, that University would provide equivalent protection to a future Laramie station on Channel *8. Here, CWC has demonstrated that the 28 dBu interfering contour from its proposed facilities would fall entirely within the 28 dBu contour of a hypothetical station with maximum facilities at the reference point. Further, the predicted interference area produced by CWC's proposed operation is actually smaller than that which would be produced by hypothetical stations operating with full facilities at either the Laramie reference co-ordinates or a fully-spaced site. See Exhibit 1. Thus, CWC will provide greater than equivalent protection to University's proposed facilities. While a slight additional short-spacing is now proposed, it is not

the full 15.7 kilometers discussed by the University and SCC but rather only the difference of 2.3 kilometers (1.43 miles) between the clearly acceptable spacing at the reference point and the spacing at CWC's proposed site. See Exhibit 1.

19. Furthermore, there would be no objectionable interference because of the mountainous terrain that lies between University's Cheyenne Mountain site and CWC's proposed site. University itself, in obtaining its own waiver, argued that this terrain shielding would eliminate the possibility of objectionable interference. Indeed, in its letter granting University's construction permit, the Commission specifically notes that University had stated "that the terrain north and west of the proposed site is mountainous toward both Grand Junction and Laramie and that no objectionable interference will result." See Exhibit 8. Therefore, opposing CWC, after having successfully made the same argument of terrain shielding, smacks of an abuse of process.⁷ University cannot have it both ways, first arguing that there would be no interference to obtain its own construction permit and then arguing that CWC's proposed site, only 2.3 kilometers closer, would cause objectionable interference.

20. Furthermore, University and SCC claim in their Joint Petition to Deny that CWC's proposed facilities would cause interference in an area which includes Denver and its surrounding

⁷ CWC recognizes that the Joint Petition was, in fact, the result of SCC's commercial desires and that the petition was in fact prepared and paid for by SCC.

area. Joint Petition to Deny Engineering Statement at 2. In requesting the channel exchange, however, University and SCC stated that although the proposed KTSC facilities would be predicted to provide Grade B service over the Denver area, "[t]his gain of service in the Denver area does not occur. There is intervening mountainous terrain between the proposed KTSC(TV) site and Denver." Petition for Issuance of Notice of Proposed Rulemaking to Change Channels, Engineering Statement at 2. Once again, University and SCC cannot have it both ways, claiming first that there is no interference and then that there is, depending on which statement serves their purposes at the time.

B. The Sincerity of the Interference Claims Made is Highly Dubious.

21. The sincerity of University's participation in the Joint Petition to Deny is doubtful. Indeed, shortly after the CWC application appeared on public notice on January 29, 1993, as having been accepted for filing, Gregory T. Ray, general manager of CWC's station KCWC-TV, received an unsolicited telephone call from Greg Sinn, general manager of KTSC. See Statement of Gregory T. Ray, attached hereto as Exhibit 9. In speaking with Mr. Ray, Mr. Sinn was highly complimentary of the way in which CWC had handled the short-spacing situation involving the proposed facilities of KTSC and CWC. Mr. Sinn also stated that he did not see any problems with CWC's proposed installation and was happy that CWC had examined the potential ramifications of its proposed facility. Id. The filing of the Joint Petition to Deny therefore came as a

surprise to Mr. Ray and leaves little doubt that it was motivated by SCC and not by University.

22. On March 23, 1993, Mr. Ray called Mr. Sinn to determine whether there had been some misunderstanding earlier. Id. Mr. Sinn confirmed that his earlier comments praising CWC's engineering had been genuine. Mr. Sinn said that the problem is the proposed channel exchange with KOAA-TV. Mr. Sinn recounted to Mr. Ray that KOAA-TV is in a highly competitive situation with the other network affiliates and therefore is anxious to acquire the Channel 8 construction permit and the extended coverage it would provide. Likewise, Mr. Sinn said, the University is eager to acquire the existing KOAA-TV facility plus \$1 million cash (previously stated to consist of \$250,000 for translators and the balance for programming).

23. Mr. Sinn told Mr. Ray that KOAA-TV had the Joint Petition to Deny drafted and that KOAA-TV had told the University that the Petition should be filed in order to avoid giving a potential advantage to KOAA-TV's commercial competitors. Id. Mr. Sinn further stated to Mr. Ray that the University did not see the Joint Petition to Deny prior to its filing. Id.

24. Mr. Sinn further informed Mr. Ray that a "red flag" had gone up with SCC's legal counsel when he discovered that CWC happens to be represented by the same legal counsel that represents Pikes Peak, which has filed pleadings in opposition to SCC. Mr. Ray also spoke with Ken Renfrow, chief engineer of KOAA-TV, on March 22, 1993. Both Mr. Sinn and Mr. Renfrow told Mr. Ray that

counsel for SCC had surmised from the timing of CWC's application, which occurred shortly after Pikes Peak and KKTU filed their respective petitions seeking revocation of the Cheyenne Mountain construction permit, that political forces had brought about the filing of the application. Id. This wild SCC speculation could not be farther from the truth. In point of fact, CWC has had firm plans to apply for the Laramie allocation since at least 1991. Id.

25. CWC is the sole noncommercial educational television licensee in the state of Wyoming. It currently provides public television service to a considerable portion of Wyoming using one full power television station, KCWC-TV, and a network of translators and LPTV stations. CWC has long wished to file an application for Channel *8 at Laramie in order to allow it to serve the southeastern portion of Wyoming, which currently does not receive service from CWC. In 1991, CWC concluded that it would be realistic to plan for filing an application for the Laramie channel in the near term. The application was not filed until December 1992 because of the need to obtain an allocation of matching state funds in order to receive an NTIA grant and then to prepare the application. Id. On December 10, 1992, CWC filed its application, not expecting opposition by SCC, given the Commission's language in its grant of University's modification application for the Cheyenne Mountain site. Approximately one month later, on January 13, 1993, CWC followed with its NTIA grant application.

26. Thus, CWC has unwittingly been drawn into a battle between a commercial station, KOAA-TV, which desires to expand its

service and those which have opposed its efforts. SCC's and University's Petition appears to be based not on the merits of the situation, but on the attempts of commercial station KOAA-TV to improve its competitive position, and thus University and SCC have jointly sought to use, if not abuse, the Commission's processes for the benefit of SCC, not University. CWC has not participated in any way in the matters involving KOAA-TV and KTSC and has no desire to do so. It is University, and more specifically SCC, that is involving CWC in that affair.

C. Fully Spaced Transmitter Sites Are Not Practical.

27. University and SCC have suggested that there are fully spaced sites available from which CWC could operate. The sites suggested by the Petitioners are not practical, however, as explained in the attached declaration from CWC's consulting engineer.⁸ See Exhibit 1. There are no developed communications sites to the north of the site proposed by CWC. See Exhibit 1. The site chosen was selected after personally inspecting at least ten potential sites. Id. As stated in the application, the site was selected based upon a set of criteria designed to provide maximum service to the public, and not on generalized reasons. Those criteria included: (1) the provision of a first, high quality noncommercial educational television service to Laramie and

⁸ The same problem was faced by University, and it argued in support of its modification application that the Cheyenne Mountain site was the most practical, not only because of better coverage of Colorado Springs, but also because of the existence of power and roads at that "antenna farm" location.

Cheyenne; (2) site development costs consistent with maximization of state and federal financial resources; (3) compatibility with other existing communications users and with other uses; (4) a location sufficiently far north to minimize the impact on Channel 8 at Pueblo, Colorado; (5) suitability for future use by KUWR(FM); and (6) suitability for interconnection with other public radio and television services in Wyoming. Id.

28. While there is high elevation terrain in fully spaced locations, those sites are largely inaccessible. Any trails that are present would be entirely inadequate as access to a transmitter site. University and SCC point to three hypothetical alternate sites, and claim that maps show that there are dirt roads to two of those sites. The so-called "roads" to which the Petitioners refer, however, are nothing more than badly eroded jeep trails which are not maintained for regular use. Id. Additionally, no power is available at these sites, and the closest source of electric service would be miles away. Id. Accordingly, the cost of development would be prohibitive, particularly for a non-commercial entity such as CWC.

29. Furthermore, sites to the north of that proposed by CWC would provide insufficient coverage of Cheyenne. The site chosen by CWC would allow it to provide Grade A coverage to Cheyenne, as well as city grade coverage to Laramie, while the sites proposed by the Petitioners would not achieve those results without use of a very tall tower. Id. Such a tower would be prohibitively expensive, and Cheyenne and Laramie most likely would continue to

receive no over-the-air public television service. Id. It is crucial to CWC that it is able to provide high quality service to Cheyenne. Cheyenne, the state capital of Wyoming, currently receives no over-the-air public television service. Id. CWC is the state educational institution used by the state to provide public television to the people of Wyoming, and throughout the state, CWC is known as Wyoming Public Television. See Exhibit 9. It is therefore critical that CWC be able to provide high quality service to the state capital, Cheyenne.

30. That University argued in obtaining its construction permit that since the University serves Colorado Springs as well as Pueblo, it was important that KTSC improve its service to Colorado Springs should be kept in mind when evaluating CWC's application, since this argument is applicable with even more force to the situation of CWC. It is undisputed that CWC's mission is to provide public television service to as much as possible of the state of Wyoming. That it is especially important that CWC be able to provide service to the state capital is rather self-evident.

31. Likewise, as CWC is the sole provider of public television in Wyoming, it is essential that it be able to interconnect its new Laramie station with its existing stations as part of the statewide Wyoming educational television network. A number of the sites examined, however, did not have microwave paths available that would allow for this interconnection within the budgetary resources available to the state. See Exhibit 1. Hence, the site proposed by CWC is of critical importance.

D. Use of the Proposed Site Would Have Significant Public Interest Benefits.

32. Use of CWC's proposed site would have significant public interest benefits, especially since the site proposed would allow for maximization of scarce state and federal resources as site development costs would be reduced. Furthermore, the proposed television station could be co-located with KUWR(FM), a noncommercial educational FM station licensed to the University of Wyoming. Additionally, the proposed site is suitable for the planned interconnection with the other public radio and television services offered by the University of Wyoming and CWC. See Exhibit 1. The proposed Laramie station will be interconnected with other stations as part of the state of Wyoming's educational television network. A number of the other sites considered did not have microwave paths available that would allow the practical implementation of this interconnection. Id. Of importance is the fact that the site proposed would allow maximization of service to an underserved area that is almost entirely without over-the-air public television service. Indeed, only a small section of the southern portion of CWC's proposed Grade B contour receives theoretical Grade B service from any other public television station, and that station is KBDI(TV), located in Denver, Colorado. Finally, CWC's proposal would allow for activation of a channel that has been lying fallow since the original Television Table of Allotments was adopted in 1952.

V. CONCLUSION

33. In sum, CWC's proposed facilities are fully spaced to University's licensed facilities. While CWC's proposed facilities would be short-spaced to the facilities in University's Cheyenne Mountain construction permit, that permit is no longer viable. University has indicated that it has abandoned its plans to construct and it has not provided sufficient reasons for an extension of the permit. Furthermore, it is doubtful that the Commission will approve a channel exchange that would allow SCC to build the proposed facilities. Accordingly, no waiver of the Commission's spacing rules is required. Even if the construction permit were viable, CWC has demonstrated that a waiver of the Commission's spacing rules is warranted. It will provide equivalent protection to the proposed KTSC facilities, and terrain shielding will eliminate the possibility of harmful interference. Further, fully spaced sites would be impractical, and significant public interest benefits would accompany use of the proposed site.

WHEREFORE, the premises considered, CWC respectfully requests that the Commission deny the Joint Petition to Deny and grant CWC's application for construction permit for a new noncommercial educational station to operate on Channel *8 at Laramie, Wyoming.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Zilpha S. Owens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, do hereby certify that a copy of the foregoing "Opposition of KKTU, Inc. to Joint Motion to Consolidate Proceedings" was mailed this 31st day of August, 1993, first-class mail, postage prepaid to the following:

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